In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-53

NICHOLAS LASORSA AND SALVATORE CAIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to sell heroin without a buyer's written order form, in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237(b). Each petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioners contend (1) that the prosecutor used prejudicial language in his summation before the jury; (2) that the trial judge committed "plain error" in failing to instruct the jury fully relative to the caution it should exercise in evaluating the testimony of government witnesses who were accomplices; (3) that the trial judge committed trial errors with respect to certain rulings on the admissibility of evidence; and (4) that

the defendants' right to a jury trial was abrogated by the substitution of one judge for another on the final day of the trial.

Each of the issues raised by petitioners is fully answered in the opinion of the court of appeals, on which we principally rely. We add the following brief comment. Contrary to petitioners' claim, there is no conflict among the courts of appeals as to whether the failure to give a so-called "accomplice instruction" constitutes plain error. The cases cited by petitioners show that the determination whether plain error was committed depends on the record in any given case. See, *e.g.*, *Tillery* v. *United States*, 411 F. 2d 644, 647 (C.A. 5) (cited at Pet. 10) ("The failure to warn a jury about accomplice testimony is not necessarily reversible error in all cases") and *United States* v. *Griffin*, 382 F. 2d 823 (C.A. 6) (cited at Pet. 20-21) (holding that the failure to so instruct the jury is plain error only under "exceptional circumstances"). Here the court of appeals, after "carefully" reviewing "the charge Judge Gagliardi delivered to the jury and the statements made to the jury by the defendants' attorneys during their final arguments" (Pet. App. 9a), concluded that "the defendants were not prejudiced by Judge Gagliardi's failure to caution the jury specifically that accomplice testimony must be 'scrutinized with care and caution'" (*ibid.*). This factual determination does not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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